Supreme Court, U.S.
FILED

No. 01 108 JUL 17 2001

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IN THE

Supreme Court of the United States

MICHAEL ASBURY AND KATHRYN ASBURY,
PARENTS OF DANIEL ASBURY,
Petitioners,

v.

MISSOURI DEPARTMENT OF
ELEMENTARY AND SECONDARY EDUCATION,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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124 pp

QUESTION PRESENTED

Since the enactment of the Education for All Handicapped Children Act of 1975, now called the Individuals with Disabilities Education Act, Congress has required states to "ensure that all personnel necessary" to the education of children with disabilities "are appropriately and adequately prepared" by "acquiring and disseminating . . . significant knowledge derived from education research" and "adopting, where appropriate, promising practices." 20 U.S.C. §1413(a)(3) (pre-1997); 20 U.S.C. §§1412(a)(14), 1453(c)(3)(D)(vii) (1997). This Court, in *Board of Educ. of the Hendrick Hudson Central Schl. Dist. v. Rowley*, 458 U.S. 176 (1982), adopted a deferential standard for reviewing state and local decisions regarding the choice of educational methods for individual children with disabilities, conditioned, however, upon the state's compliance with its statutory responsibilities, *inter alia*, to ensure that personnel have been properly prepared with the knowledge needed to make such choices. 458 U.S. at 206-207. In this case the Eighth Circuit adopted a rule of deference but erroneously failed to enforce the statutory safeguards upon which this Court indicated the rule of deference depends. The lower court did so by ruling that it had no authority to address the state's failure to comply with the statutory requirements that pertain to personnel development.

The question presented is whether a court has the authority to review a state's compliance with its personnel development duties under the Individuals with Disabilities Education Act.

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OPINIONS BELOW

The Opinion of the Eighth Circuit Court of Appeals, rendered on April 18, 2001, can be found at 248 F.3d 1163, 2001 U.S. App. LEXIS 7074. A copy of that Opinion and the unpublished Memorandum and Order of the United States District Court for the Eastern District of Missouri, rendered May 9, 2000, are reproduced in the Appendix to this Petition.

JURISDICTIONAL STATEMENT

The Eighth Circuit Court of Appeals entered its Opinion and Judgment on April 18, 2001. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. §1254(1).

STATUTES INVOLVED

When this lawsuit was filed, the relevant provisions of the Individuals with Disabilities Education Act provided:

Section 1413 State Plans

(a) Requisite features

Any State meeting the eligibility requirements set forth in Sec. 1412 of this title and desiring to participate in the program under this subchapter shall submit to the Secretary, through its State educational agency, a State plan at such time, in such manner, and containing or accompanied by such information, as the Secretary deems necessary. Each such plan shall—

* * *

(3) describe, consistent with the purposes of this chapter and with the comprehensive system of personnel development described in Sec. 1476(b)(8) of this

title, a comprehensive system of personnel development that shall include—

(B) a description of the procedures and activities the State will undertake to ensure that all personnel necessary to carry out this subchapter are appropriately and adequately prepared, including—

* * *

(ii) procedures for acquiring and disseminating to teachers, administrators, and related services personnel significant knowledge derived from education research and other sources; and

(iii) procedures for adopting, where appropriate, promising practices, materials, and technology.

20 U.S.C. §1413 (pre-1997).

Effective July 1, 1998, as part of the 1997 amendments to the Individuals with Disabilities Education Act, those provisions were amended. The relevant personnel development provisions now provide:

Section 1412 State Eligibility

(a) In general.

A State is eligible for assistance under this subchapter for a fiscal year if the State demonstrates to the satisfaction of the Secretary that the State has in effect policies and procedures to ensure that it meets each of the following conditions:

* * *

(14) Comprehensive system of personnel development.

The State has in effect, consistent with the purposes of this chapter and with Sec. 1435(a)(8) of this title, a comprehensive system of personnel development that is designed to ensure an adequate supply of qualified special education, regular education, and related services personnel that meets the requirements for a State improvement plan relating to personnel development in subsections (b)(2)(B) and (c)(3)(D) of Sec. 1453 of this title.

20 U.S.C. §1412 (1997).

Among the provisions incorporated into that section is the following requirement:

Section 1453 Applications

* * *

(c) Improvement strategies

Each State improvement plan shall—

* * *

(3) describe the strategies the State will use to address the needs identified under subsection (b) of this section, including—

* * *

(D) how the State will address the identified needs for in-service and pre-service preparation to ensure that all personnel who work with children with disabilities (including both professional and paraprofessional personnel who provide special education, general education, related services, or early intervention services) have the skills and knowledge necessary to meet the

needs of children with disabilities, including a description of how—

* * *

(vii) the State will acquire and disseminate, to teachers, administrators, school board members, and related services personnel, significant knowledge derived from educational research and other sources, and how the State will, when appropriate, adopt promising practices, materials, and technology.

20 U.S.C. §1453 (1997).

STATEMENT OF THE CASE

1. Petitioners are the parents of a child with autism, Daniel Asbury. They brought this case to challenge the conduct of respondent Missouri Department of Elementary and Secondary Education (DESE) in its role as state agency responsible for Missouri's compliance with the Individuals with Disabilities Education Act (IDEA). The Asburys complain that DESE failed and continues to fail to provide the personnel of the public school districts in Missouri with the information and resources that the IDEA requires and that the public schools need for the appropriate education of children like their son Daniel. This case is based on the obligations of the "States" prescribed by Congress in the IDEA and recognized by this Court in its seminal case under the Act, *Board of Educ. of the Hendrick Hudson Central Schl. Dist. v. Rowley*, 458 U.S. 176, 207 (1982): "The Act expressly charges States with the responsibility of 'acquiring and disseminating to teachers and administrators of programs for handicapped children significant information derived from educational research . . . and [of] adopting, where appropriate, promising educational practices.'"

2. The district court granted summary judgment for the state because the court believed it had no authority to evaluate the state's procedures or judge the quality of its compliance efforts. For example, the court found, "nothing in the relevant statutory or regulatory provisions at issue which limit the manner in which defendant must disseminate the information." Order 5/9/00 App. A-84. With respect to the state's duty to adopt promising practices, the district court also believed it could not assess the state's conduct, as long as the state had a procedure on the books: "Regardless of whether

the Court finds them reasonable, however, the fact that such a procedure exists is sufficient for the Court to conclude that defendant has satisfied any duties it has to ensure that promising practices are adopted." App. A-85. Similarly, with respect to teacher training, the court held that the facts that "Project ACCESS distributes information and holds training sessions with respect to children with autism. . . . are sufficient to establish" compliance with IDEA's requirements. App. A-94-95. The Eighth Circuit affirmed "on the basis of the district court's . . . decision." Order 4/18/01, App. A-2.

3. Dissatisfied with Daniel's lack of progress after two years in the public school system, petitioners conducted some educational research on their own. At their local county library they discovered a method of educating children with autism that appeared extremely promising, using the principles of Applied Behavior Analysis (ABA) in a one-on-one program of discrete trial training (DTT). Research published in 1987 shows that 47% of children who receive an intensive ABA program recover permanently from their autism, another 42% of those children improve significantly, and most of the remaining children achieve some improvement. The research shows that the children who "recover" from their autism are able to attend regular classrooms with no further special education services and become indistinguishable from the non-disabled children in their classes.[1]

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[1] The 1999 Report of the Surgeon General of the United States on Mental Health, in Chapter 3, indicates: "Thirty years of research demonstrated the efficacy of applied behavioral methods" for children with autism. It describes the 1987 and 1993 ABA research by Dr. Lovaas and his colleagues as a "well-designed study." *See* http://www.surgeongeneral.gov/library/mentalhealth/chapter3/sec6.html. ABA has been described and found to be appropriate for specific children with autism in several court

Continued on next page

The Asburys arranged for Daniel to have a program of applied behavioral therapy in their home. After Daniel achieved some significant success, the Asburys notified the school district of their discovery and requested that the district fund the home program and integrate it with the services Daniel was receiving at school. The school district's refusal to provide Daniel the type of program his parents requested, or any other program that offered similar promise, led to the dispute that brings the Asburys to this Court.

After exhausting their administrative remedies and settling their claims against their school district, petitioners brought this lawsuit, claiming that the state agency, defendant DESE, failed to fulfill its statutory obligations to provide local school districts with the information they need to make informed choices.

4. The evidence in this case viewed in the light favorable to petitioners shows that respondent Missouri

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Footnote 1 continued.

decisions. *E.g., Malkentzos v. DeBuono*, 923 F.Supp. 505 (S.D.N.Y. 1996), *remanded on other grounds*, 102 F.3d 50 (2d Cir. 1996); *Mr. X v. New York State Education Department*, 975 F.Supp. 546, 558-59 (S.D. N.Y. 1997); *Delaware County Intermediate Unit No. 25 v. Martin K.*, 831 F. Supp. 1206 (E.D. Pa. 1993). As the district court explained in *Malkentzos v. DeBuono*:

> In recognition of the autistic child's inability to learn as others do, ABA breaks down activities into discreet individual tasks, and rewards accomplishment. Eventually, the child learns to integrate information and associate instruction with a given activity. ABA is not administered indefinitely; usually after two or three years the child acquires learning skills and can proceed to more traditional education.

923 F.Supp. at 509 (citations omitted).

Department of Elementary and Secondary Education failed to disseminate any significant knowledge derived from education research and failed to adopt any promising practices regarding the education of children with autism. Instead, DESE distributed outdated and erroneous information indicating that the vast majority of such children are and are likely to remain mentally retarded and unable to communicate. While it did not adopt any particular practice, DESE promoted educational practices that either are without any support in research or have been shown to be ineffective in the published literature.

In response to the state's motion for summary judgment, petitioners presented the expert testimony of Dr. Tristram Harry Smith, of the Department of Psychology, Washington State University, to testify about his and Dr. O. Ivar Lovaas' research concerning the appropriate treatment and education of preschool and young school aged children with autism. Dr. Smith was involved in both the 1987 and 1993 Lovaas research studies. He explained that these studies were published in peer-reviewed journals of long professional standing. The purpose of peer review was to obtain independent assurance that the research is of technically sound quality. Dr. Smith testified that the publication of five peer commentaries on the 1993 study was an unusual mark of the study's distinction.

In contrast to the practice of educating children with autism with intense one-to-one ABA services, Dr. Smith opined that the prognosis of a preschool child with autism is that they don't improve and remain "really pretty impaired." Dr. Smith also opined that the prognosis when given the ABA treatment is "significantly better," but with "big individual differences in the outcome."

Petitioners also presented the testimony of expert witness Dr. Patricia M. Meinhold regarding the ABA research and Missouri's dissemination of information regarding educating children with autism. Dr. Meinhold described the Lovaas 1987 research as "one of the best controlled and conducted research evaluations in the literature on the treatment and education of children with Autism" and she noted that it "has received unprecedented attention in the field since its publication over ten years ago." She noted that DESE "relies heavily" on a subcontractor, Project ACCESS for dissemination of information about educating children with autism: "specialized teacher training, a library of treatment and educational materials, consultations to teachers, and workshops, all concerned with the education and treatment of students with Autistic Disorder." She explained that contrary to DESE and ACCESS's ideology or assumptions about children with autism having a predictable course that must be supported, accommodated and accepted, "Lovaas and his colleagues have convincingly demonstrated that early intensive environmental events (discrete trial treatment) can produce dramatically different outcomes despite the likely neurological underpinnings of the disorder."

Dr. Meinhold concluded that while "ACCESS staff were aware of the existence of the Lovaas 1987 outcome study, the 1993 follow up of those subjects and related research reports," for some reason that she was unable to discern, "they chose to withhold these extraordinary empirical findings from parents and teachers seeking advice about effective interventions for preschoolers with Autism." Dr. Meinhold was unable to understand "why DESE chose not to disseminate this most promising intervention on their own once they became aware

of it, and once they became aware that it was not represented in the ACCESS program material." In her concluding remarks, Dr. Meinhold stated: "Although the ACCESS program (and relevant DESE administrators and staff) were clearly aware of the Lovaas and related outcome studies in the early 1990's, they do not appear to have been in support of this extraordinarily effect (sic) treatment and did not distribute the relevant features of this research to parents and staff."

According to Dr. Meinhold, not only did DESE and ACCESS choose not to disseminate the positive information about the Lovaas research findings, what they did disseminate about it was inaccurate. "Inaccuracies were sometimes so significant that frank misinformation about behavior analysis in general and discrete trial training in particular was presented as expert training to DESE staff and parents."

Dr. Meinhold stated that the information that has been disseminated by DESE, through Project ACCESS is seriously deficient:

> DESE has been relying on a highly selective sampling of these resources and relying on an often inaccurate characterization of the state of the science in Autism education and treatment. This has caused them to remain far from their goal (and mandate) of providing students with Autistic Disorder effective programs of education and related services.

Dr. Meinhold explained that from the ACCESS materials she "was able to detect an ideology (or set of assumptions) about students with Autistic Disorder and their needs" that features support over change of behaviors, focuses on adjustments and accommodations

and teaches "Acceptance of the disability" as a "primary goal for the students and families."

Dr. Meinhold described the "specific treatment and educational technologies . . . which are prominently featured in ACCESS materials," and concluded that while "DESE and ACCESS claim to select and disseminate educational practices that are 'effective and data based,'" the procedures they support and adopt are neither. Instead, Dr. Meinhold stated that with minor exceptions, the procedures disseminated by ACCESS "are entirely without peer reviewed, published scientific support. In fact, in some instances they have been shown to be *ineffective* in peer reviewed, published scientific work."

The expert witnesses hired by the Missouri Department of Elementary and Secondary Education agreed with many of the principles espoused by petitioners' experts. Dr. B. J. Freeman testified about the importance for children with autism of receiving "intense intervention" and ABA services; "there is no question—early intervention using applied behavior analysis is an important part of a program for any child with autism." Respondent's experts also agreed that the information disseminated by DESE and Project ACCESS about poor prognosis for children with autism is wrong. According to Dr. Freeman, "there is still a lot of misinformation out there, that the prognosis for children with autism is poor." Dr. Freeman agreed with petitioners' experts that "the reality is the prognosis for children with autism is pretty good with intervention."

5. Pursuant to the IDEA, 20 U.S.C. §1415(f)(1) (1997), the Asburys initiated an administrative complaint in 1997 in an attempt to resolve their disagree-

ment with their local school district, the Special School District of St. Louis County, and defendant DESE. In May 1998 the Asburys entered into a settlement agreement with the Special School District of St. Louis County (SSD) providing for an Applied Behavioral Analysis educational program for Daniel in the Asburys' home, calling for the use of ABA trained paraprofessionals to work with Daniel in SSD classrooms, and paying the Asburys a total of $133,000.00 in damages, reimbursement, and attorneys' fees. Also in May 1998 the administrative complaint against defendant DESE was dismissed.

In June 1998 the Asburys filed this lawsuit against defendant DESE. The trial court, Judge E. Richard Webber, ruled in January 1999 that plaintiffs stated legitimate claims for relief under both the IDEA and the Rehabilitation Act. In May 2000, however, the court granted DESE's motion summary judgment and dismissed all of plaintiffs' claims.

Petitioners brought this action in the United States District Court for the Eastern District of Missouri on the grounds that respondent violated the substantive and procedural requirements of the Individuals with Disabilities Education Act, 20 U.S.C. §§1400, *et seq*. (IDEA). The district court had subject matter jurisdiction pursuant to 20 U.S.C. §1415 and 28 U.S.C. §§1331 and 1343.

REASONS FOR GRANTING THE WRIT

The local public schools are dependent upon the state education agency for doing its part to ensure that children with disabilities receive an appropriate education. According to the lower courts' interpretation of the IDEA, however, as long as the state delivers some information, the state is free to leave the school districts in the dark about clearly significant educational research and promising practices, free to train teachers to educate children using methodologies that have been proven to fail, and, even if it is wrong, free to train teachers that most children with autism are mentally retarded and are not likely to improve. That is not what Congress intended when it passed the IDEA and it is contrary to the rationale behind this Court's decision in *Rowley*.

In addition to the general importance of the courts' authority to evaluate the states' compliance with their personnel development duties under the IDEA, the issues in this case are particularly compelling because they involve the education of children with autism. The number of children being diagnosed with autism is growing rapidly.[2] The consequences of an ineffective education for these children are devastating. With the interventions that are supported by educational research nearly half of the children with autism can grow to be indistinguishable from their peers and become productive, independent citizens. Without such interventions, the vast majority of children with autism will

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[2] According to *Newsweek*, "In the 90's, the national demand for autism services rose 556 percent." http://www.msnbc.com/modules/newsweek/talk/436635.asp.

spend their lives in institutions or other restrictive facilities, forever dependent upon the support of taxpayers.

The lower courts erred when they held that the state's performance of its IDEA personnel development duties is not subject to judicial oversight. To the contrary, the language of the statute, its legislative history, and its interpretation by this Court, all establish that the personnel development duties are mandatory and enforceable. Moreover, those duties are essential to the core purpose of the IDEA to provide the school districts with the means to provide effective educational services to enable children with disabilities to "meet developmental goals" and "be prepared to lead productive, independent, adult lives." 20 U.S.C. §1400(c)(5). All courts have interpreted the IDEA to make enforceable against the states the duties that are specifically assigned to the states.

I. The Decisions Below Conflict with the Language of the IDEA and its Legislative History

The language and legislative history of the IDEA indicate that the states' duties to help the school districts provide meaningful and effective educational programs have substance and are enforceable. Congress did not give the states complete and unfettered discretion to carry out their personnel development activities as they see fit, but required the states to implement a system "to ensure . . . all personnel . . . are appropriately and adequately prepared" to do their jobs. 20 U.S.C. §1413(a)(3)(B) (pre-1997). "[T]he statutory language of Part B of the IDEA, by repeatedly using the word 'ensure,' unambiguously requires the state 'to make certain' that the IDEA's statutory requirements are

carried out." *Corey H. v. Board of Educ. of the City of Chicago*, 995 F. Supp. 900, 913 (N.D. Ill. 1998).

Congress did not leave it to the states to decide what information to distribute, but specified that they must disseminate "significant knowledge derived from education research," and they must have procedures for adopting "where appropriate, promising practices." *Id.*

In the legislative history of the original enactment of the Education of All Handicapped Children Act in 1975 (the precursor to IDEA), Congress said:

> The long range implications of these statistics [regarding children with disabilities] are that public agencies will spend billions of dollars over the lifetimes of these individuals to maintain such persons as dependents and in a minimally accepted lifestyle. With proper education services, many would be able to become productive citizens, contributing to society instead of being forced to remain burdens. Others, through such services, would increase their independence thus reducing their dependence on society.

S. Rep. No. 94-168, p. 9 (1975), U.S. Code Cong. & Admin. News 1975, p. 1433.

Over 20 years later, when it amended and reauthorized the IDEA in 1997, Congress reiterated that theme and criticized the states for failing to heed it. Congress expressed serious concerns over the lack of compliance in the areas at issue in this case:

> [T]he implementation of this Act has been impeded by low expectations, and an insufficient focus on applying replicable research on proven methods of

> teaching and learning for children with disabilities. 20 U.S.C. §1400(c)(4).

Congress noted that "[o]ver 20 years of research . . . has demonstrated that the education of children with disabilities can be made more effective," among other ways by, "having high expectations for such children . . . strengthening the role of parents . . . coordinating this Act with other local, educational service agency, State, and Federal school improvement efforts . . . [and] supporting high-quality, intensive professional development for all personnel who work with such children." 20 U.S.C. §1400(c)(5). Congress stated quality teacher training – including the dissemination of significant information – would provide the kind of direct and dramatic benefits that Dr. Lovaas, Dr. Smith, and others have shown is within the reach of children with autism. Congress envisioned that proper teacher training, based on the research that has been performed in the last 20 years, would "ensure that [children with disabilities] have the skills and knowledge necessary to enable them—

> (i) to meet developmental goals and, to the maximum extent possible, those challenging expectations that have been established for all children; and
>
> (ii) to be prepared to lead productive, independent, adult lives, to the maximum extent possible."

20 U.S.C. §1400(c)(5).

II. Certiorari is Warranted Because the Decisions Below Conflict with Decisions of This Court and of Other Circuits

In determining whether a child was provided a free appropriate public education under the IDEA, this Court emphasized the importance of the exact requirements at issue in this case. *Board of Educ. of the Hendrick Hudson Central Schl. Dist. v. Rowley*, 458 U.S. 176, 206-208 (1982).[3] The Court explained that the development of a child's educational program and choice of the most suitable methodology is the "primary responsibility" of "state and local educational agencies in cooperation with the parents." 458 U.S. at 207. But in order to fulfill that primary responsibility, the Court recognized that "States" must first fulfill their own statutory obligation to provide the local school district educators with the information they need to make informed choices: "The Act expressly charges States with the responsibility of 'acquiring and disseminating to teachers and administrators of programs for handicapped children significant information derived from educational research.'" *Id.* In addition, the Court noted that the IDEA gave "States" the duty to adopt promising educational practices, where they are appropriate. *Id.* Only if the state, defendant DESE in this case, has met its obligations to disseminate significant information from educational research and to adopt promising practices, is a state's or local school district's development of an educational program or choice of methodology entitled to deference by a reviewing court.

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[3] The lower courts in this case decided that they lacked the authority to evaluate the state's compliance with the personnel development duties of the IDEA, without even mentioning this Court's *Rowley* decision.

> In assuring that the requirements of the Act have been met, courts must be careful to avoid imposing their view of preferable educational methods upon the States. The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child. The Act expressly charges States with the responsibility of "acquiring and disseminating to teachers and administrators of programs for handicapped children significant information derived from educational research, demonstration, and similar projects, and [of] adopting, where appropriate, promising educational practices and materials." Section 1413(a)(3).

Rowley, 458 U.S. at 207.

The *Rowley* Court did not enunciate an isolated rule that "questions of methodology are for resolution by the State." Rather, in Justice Rehnquist's majority opinion, the Court stated that, "once a court determines that the requirements of the Act have been met, questions of methodology are for resolution by the States." 458 U.S. at 208. The difference between the two formulations is vital, and the judicial duty to determine whether the requirements of the IDEA have been met is an indispensable prerequisite to the invocation of the rule of deference.

The rule that deference under the IDEA is warranted only after a determination of compliance with the statutory requirements has been articulated by other courts of appeal. *See, e.g., Polk v. Central Susquehanna Inter-*

mediate Unit 16, 853 F.2d 171, 184 (3rd Cir. 1988) ("we do not read the Supreme Court's salutary warnings against interference with educational methodology as an invitation to abdicate our obligation to enforce the statutory provisions that ensure a free and appropriate education to Christopher"); *New York State Educational Association for Retarded Children v. Carey*, 612 F.2d 644, 648 (2nd Cir. 1979) ("In many contexts the reasoned decision-making of administrators bearing sensitive responsibilities is entitled to judicial deference. However, the courts are also assigned a sensitive task, and that task is to ensure that established legal standards . . . are followed by government agencies.")

The First Circuit recognized the importance of the state's obligations to keep its school personnel informed and educated as to developments in educational methodologies. Under the IDEA the concept of an "appropriate" education is not—and is not intended to be—static. An educational practice that is fully appropriate at one point in time can be rendered inappropriate by developments in educational research. As the First Circuit explained in holding that even the most severely impaired children are entitled to an education under the IDEA:

> The law explicitly recognizes that education for the severely handicapped is to be broadly defined, to include not only traditional academic skills, but also basic functional life skills, and that educational methodologies in these areas are not static, but are constantly evolving and improving. It is the school district's responsibility to avail itself of these new approaches in providing an education program geared to each child's individual needs.

Timothy W. v. Rochester, New Hampshire, Schl. Dist., 875 F. 2d 954, 973 (1st Cir. 1989).

It is unthinkable that Congress and this Court intended that the education of a child with a disability be limited to the particular methodology that happens to be within the knowledge of the teacher to which the child has been assigned. The IDEA requires that the states ensure the dissemination of significant knowledge that has been researched and developed in colleges and universities and that the states adopt practices that are promising. The decisions of courts below allow the states to disregard those fundamental statutory requirements.

CONCLUSION

For the reasons stated above the petition for a writ of certiorari should be granted.

Respectfully submitted,

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